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MEMORANDUM

To: Dan Kraft

cc: Joseph Cosentino  
Deborah Mellott  
Ray Basso

From: Sarah Flanagan

Date: March 21, 2006

Re: Bayonne Barrel & Drum/Impact of TSCA on Selection of Final Removal Action

This will follow up on our telephone conference in December 2005 in which you inquired whether the final removal activities that the responsible parties propose to take at the Bayonne Barrel & Drum Site will require the issuance of risk-based disposal approval under Toxic Substances Control Act ("TSCA") regulations found at 40 CFR § 761.61(c). You also asked whether public notice and comment would be provided for as part of EPA's approval of the removal activities.

Short Answer:

Because this cleanup is proceeding under the authority of CERCLA, a separate risk-based disposal approval need not be issued by the TSCA Program. However, assuming EPA approves the cleanup proposal, to document the fact that the removal action is consistent with TSCA's substantive requirements under 40 CFR § 761.61(c), EPA will include in the Administrative Order on Consent ("AOC") that governs the final phase of removal activities at the Site a statement that the proposed response actions are consistent with TSCA and the TSCA regulations providing for "risk-based disposal" found at 40 C.F.R. § 761.61(c). Further, ERRD will notify the public of the planned removal action and provide an opportunity for public comments, prior to final approval of the AOC.

Discussion:

The Superfund removal program has been working with the Bayonne Barrel & Drum potentially responsible party group ("PRP Group") for over four years to develop a cleanup plan for this Superfund site. Because the Site is heavily contaminated with polychlorinated biphenyls ("PCBs"), On-Scene Coordinator Joe Cosentino and I consulted with David Greenlaw, discussed the Site extensively with ERRD and ORC management, and considered other sites in the Region with PCB-contaminated soil. We have also spoken with Marlene Berg in EPA headquarters.

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The National Contingency Plan ("NCP"), which contains the regulations that govern most aspects of Superfund cleanup, provides that "removal actions pursuant to CERCLA section 106 shall, to the extent practicable considering the exigencies of the situation, attain applicable or relevant and appropriate requirements ("ARARs") under federal environmental or state environmental or facility siting laws." 40 CFR § 300.415(j). At a site like Bayonne Barrel & Drum, where PCB-contaminated soil meeting the definition of PCB remediation waste is present,<sup>1</sup> TSCA regulations at 40 CFR § 761.61 are considered applicable. (40 CFR § 761.61 "provides cleanup and disposal options for PCB remediation waste.") These regulations should be met "to the extent practicable considering the exigencies of the situation" 40 CFR § 300.415(j).

40 CFR § 761.61 offers three cleanup options for PCB remediation waste: a self-implementing approach, 40 CFR § 761.61(a); a performance-based approach, 40 CFR § 761.61(b); and a risk-based approach, 40 CFR § 761.61(c), which is also referred to as "risk-based disposal." The risk-based approach is most appropriate for the Superfund program, a program where decision-making is driven by risk, and indeed, EPA selected this approach at the Cornell-Dubilier Electronics, Inc. ("CDE") Superfund Site, an NPL site, in a Record of Decision issued September 30, 2004.

Under 40 CFR § 761.61(c), a person wishing to perform a risk-based PCB cleanup must apply to the Regional Administrator, and EPA will approve the application if it finds that "the method will not pose an unreasonable risk of injury to health or the environment." 40 CFR § 761.61(c)(2). The PRP Group has prepared and submitted a Remedial Action Selection Report ("RASR"), which sets out in detail the cleanup they propose to perform.<sup>2</sup> To ensure that EPA would be able to make the necessary finding concerning the absence of unreasonable risk, the PRP Group performed a risk assessment for the Bayonne Barrel & Drum Site, the results of which were submitted as an appendix to the RASR. Michael Sivak, a risk assessor with EPA's

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<sup>1</sup> PCB remediation waste "means waste containing PCBs as a result of a spill, release, or other unauthorized disposal, at the following concentrations; Materials disposed of prior to April 18, 1978, that are currently at concentrations of  $\geq 50$  ppm PCBs, regardless of the concentration of the original spill; materials which are currently at any volume or concentration where the original source was  $\geq 500$  ppm PCBs beginning on April 18, 1978 or  $\geq 50$  ppm PCBs beginning on July 2, 1979; and materials which are currently at any concentration if the PCBs are spilled or released from a source not authorized for use under this part. ...

<sup>2</sup> The RASR was prepared specifically pursuant to New Jersey requirements, but, coupled with the risk assessment and a separate Evaluation of Costs for Remedial Alternatives, was also intended by the PRP Group to satisfy EPA's need to document the basis for the selection of the response action.

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Superfund program, has reviewed the risk assessment and will provide comments to the PRP Group. Assuming the PRP Group can respond satisfactorily to his comments, EPA should be able to reach a determination as to whether the proposed cleanup "will not pose an unreasonable risk of injury to health or the environment" (40 CFR § 761.61(c)).

CERCLA Section 121(e) states that "no Federal, State or local permit shall be required for the portion of any removal or remedial action conducted entirely on-site, where such remedial action is selected and carried out in compliance with this section." In the context of a removal action approved by ERRD and performed under the oversight of the Removal Action Branch, it would be counter to the requirements of Section 121(e) to require the PRP Group to submit a separate application under TSCA for a "risk-based disposal approval" from the TSCA program. ERRD will consult with the TSCA Program, as it has been doing over the past few years, but instead of requiring a separate approval from the TSCA Program, assuming the proposal satisfies CERCLA's requirements and will not result in an unreasonable risk to human health or the environment, ERRD intends to insert language in the AOC recognizing that the cleanup is consistent with the requirements of 40 CFR § 761.61(c). In addition, ERRD will issue an Action Memorandum documenting the selection of the response action, which will contain parallel language.

Finally, while 40 CFR § 761.61(c) does not require public notice and comment, you have explained that the TSCA Program nonetheless builds in public notice and comment to the risk-based approval process. Similarly, ERRD has decided that given the scope of the anticipated cleanup, EPA will provide for public notice and comment for this removal action, as though it were a non-time-critical removal – even though ERRD views it as a time-critical removal. CERCLA regulations found at 40 CFR § 300.415 require that in the case of a non-time-critical removal action, an engineering evaluation/cost analysis or its equivalent should be placed in the information repository for the site, a notice of availability should be published in a major local newspaper of general circulation, an opportunity for submission of oral and written comments should be provided, and a written response should be prepared. 40 CFR § 300.415(n)(4). For the Bayonne Barrel & Drum Site, the RASR/Risk Assessment, coupled with the Evaluation of Costs, will be placed in the Site document repository, and EPA will invite comment on those documents prior to issuing an Action Memorandum and entering in the AOC.